PLOWDEN WESTON AND OTHERS, PLAINTIFFS IN ERROR *vs.* THE CITY COUNCIL OF CHARLESTON, DEFENDANTS.

A tax imposed by a law of any state of the United States, or under the authority of such a law, on stock issued for loans made to the United States, is unconstitutional.

The power of this Court to revise the judgments of state tribunals, depends on the 25th section of the judiciary act. That section enacts "that a final judgment or decree in any suit in the highest court of law or equity of a state, in which a decision in the suit could be had," where is drawn in question the validity of a statute, or of an authority exercised under any state; on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of their validity, "may be re-examined, and reversed or affirmed in the Supreme Court of the United States." [463]

The city council of Charleston, exercising an authority under the state of South Carolina, enacted an ordinance, by which a tax was imposed on the six and seven per cent. stock of the United States; and in the court of common pleas of the Charleston district, an application was made for a prohibition to restrain them from levying the tax, on the ground that the ordinance violated the constitution of the United States. The prohibition was granted, and the proceedings in the case were removed to the constitutional court, the highest court of law of the state; and in that court it was held that the ordinance did not violate the constitution of the United States, and a writ of error was prosecuted on this decision to this Court. Held, that the question decided by the constitutional court, was the very question on which the revising power of this Court is to be exercised. [464]

A writ of error to this Court may be prosecuted, where by the judgment of the highest court of the state of South Carolina a prohibition, issued in a state court, to prevent the levying of a tax which was imposed by a law repugnant to the constitution of the United States, was refused on the ground that the law was not so repugnant to the constitution. [464]

The term *suit* is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, in which an individual pursues that remedy in a court of justice which the law affords him. [464]

The words "final judgment," in the 25th section of the judiciary act, must be understood in the section under consideration as applying to all judgments and decrees which determine the particular cause; and it is not required that such judgments shall finally decide upon the rights which are litigated, that the same shall be within purview of the section. [464]

It is not the want of original power in an independent sovereign state to prohibit loans to a foreign government, which restrains the state legislature from direct opposition to those made by the United States. The restraint is imposed by our constitution The American people have conferred the power of borrowing money on the government, and by making that government supreme, have shielded its action in the exercise of that power, from the action of the local governments. The grant of the power, and the declaration of supremacy, is a declaration that no such distraining or controlling power shall be exercised. [468]

[Weston and others *vs.* The City Council of Charleston.]

THIS was a writ of error to the constitutional court of South Carolina.

On the 20th of February 1823, the city council of Charleston passed "an ordinance to raise supplies for the use of the city of Charleston, for the year 1823." The ordinance provides "that the following species of property, owned and possessed within the limits of the city of Charleston, shall be subject to taxation in the manner, and at the rate, and conformably to the provisions hereinafter specified; that is to say, all personal estate, consisting of bonds, notes, insurance stock, six and seven per cent. stock of the United States, or other obligations upon which interest has been or will be received during the year, over and above the interest which has been paid, (funded stock of this state, and stock of the incorporated banks of this state and the United States bank excepted) twenty-five cents upon every hundred dollars."

In the court of common pleas for the Charleston district, the plaintiffs in error, in May 1823, filed a suggestion for a prohibition, as owners of United States stock, against the city council of Charleston, to restrain them from levying under the ordinances, on six and seven per cent. stock of the United States and the tax imposed under the ordinance; on the ground that the ordinance, so far as it imposes a tax on the stock of the United States is contrary to the constitution of the United States.

The prohibition having been granted, the city council applied to the constitutional court, the highest court of law in the state, to reverse the order, on the ground that the ordinance was not repugnant to the constitution of the United States; and the proceedings in the case having been removed to the said court, the said court in May term 1823, by a majority of their judges (four being in favour of the constitutionality of the ordinance, and three against it), decided that the said ordinance did not violate the constitution of the United States, in imposing a tax upon the holders of United States stock. From this decision the relators appealed by writ of error to the Supreme Court of the United States.

The error assigned in this Court was; that the judgment

of the constitutional court was erroneous, in that it decided the ordinance of the city council of Charleston not to be repugnant to the constitution of the United States.

The case was argued by Mr Hayne, for the plaintiffs in error; and by Mr Crüger and Mr Legare, for the defendants.

The counsel for plaintiffs in error submitted, that if the course of proceeding adopted by the plaintiffs in error was not approved of, by requiring a prohibition in the court of common pleas, and on the decision of the constitutional court being against them by taking the writ of error, some other mode would be employed. It was the wish of all the parties to have the decision of this Court on the question involved in the case; and a ready and entire acquiescence would be yielded to the judgment of the Court by all who were interested. It was submitted to the Court, that for the purposes of justice, the Court would give an opinion upon the matter assigned for error; and if the form in which the case had been brought up was not proper, the judgment of the Court would be equally operative, and would be yielded to by the parties, plaintiffs and defendants in error.

The subject in controversy is one of proper cognizance for this Court. It involves a most important constitutional question; the right of the states, or of state authorities, to tax the funded debt of the United States.

The subject matter of the case belongs to this Court. The soundest rule that can be adopted is, that when the matter in question belongs to the jurisdiction of the federal courts, a liberal construction in favour of the powers of the court over it, should be given.

The question in this case concerns the vital means of the nation; and the power claimed to be exercised under the ordinance, would interfere with those means on emergencies of the deepest interest. It is a constitutional question, and as such is peculiarly under the guardianship of this Court.

The writ of error is to the highest tribunal of the state of South Carolina; and the decision of that court has been in favour of the constitutionality of the ordinance; thus bring-

ing the case fully within the 25th section of the judiciary act. Let this Court certify its opinion, and the controversy will be at an end.

On more occasions than one, when the Court has felt some embarrassment as to its jurisdiction, it has expressed an opinion upon important questions; and when the general good required a decision. United States *vs.* Kirkpatrick, 9 *Wheaton*, 720.

2. The act of congress organizing the courts of the United States, authorizes this Court to form and mould its process, so as to enforce and carry into effect the objects and purposes for which the federal courts were established. It is conceived that the writ of prohibition is a mode of exercising jurisdiction which is essential to those purposes. There is a strong analogy between the prohibition asked in this case, and those issued to district courts under the law. But if the writ of prohibition may not be adopted, and the Court should decide this case in favour of the plaintiffs in error, the case may be remanded to the court of common pleas for the Charleston district; and should that court refuse to proceed as required, the supreme court may itself enforce its judgment.

Upon the general question, the counsel for the plaintiffs in error argued, that the ordinance does not impose a tax on all public funds, but specifically on the six and seven per cent. stock of the United States. Thus there are selected, as the particular object of taxation, those debts of the government of the United States; and the sum the government has stipulated to pay for the loan is diminished to the extent of the tax. The contract of the general government is invaded, and its credit impaired. Its competency to negotiate loans may be destroyed by the admission of this power of taxation. There are two sources of revenue which are essentially the right of the general government. That of imposing duties, and that of borrowing money on the credit of the nation. The safety of the whole depends upon the free and undisturbed exercise of these powers. In peace, the first is necessary to revenue; in war, the se-

cond is vital to defence and success. If these powers and rights are not guarded and preserved, the functions and purposes of the union will be suspended and destroyed.

There is no warrant for this tax, to be derived from the opinion of this Court in the case of M'Cullough *vs.* The State of Maryland, 4 *Wheaton*, 316. The Court, at the close of the opinion delivered in that case, sanction a tax on property held by citizens of Maryland in the Bank of the United States, in common with other property throughout the state; but they say expressly, that "a particular tax upon the operation of an instrument employed by the government to carry its powers into execution, is void."

Mr Hayne presented, as a part of his argument, the opinion of Mr Justice Huger in the constitutional court; who with Nott and Bay, justices, dissented from the opinion of the majority of the court(*a*).

(*a*) *Huger, J. dissentiente.*—This was an application for a prohibition to restrain the treasurer of the city of Charleston from levying a tax, imposed by a city ordinance, on six and seven per cent. stock of the United States. The words of the ordinance are: All personal estate, consisting of bonds, notes, &c. six and seven per cent. stock of the United States, or other obligations, upon which interest has been or will be received during the year, over and above the interest which has been paid, (except, &c. &c.) twenty-five cents on every $100. The prohibition was ordered. A motion is now submitted for the reversal of that order. I am unwilling, on so important a question, merely to express my dissent from the judgment of the court. It is now for the first time agitated, and ought to be fully discussed, that it might be better understood. It affects the use of a power, as essential to the general government in periods of difficulty and danger, as any other which the people have delegated to it. If the city council of Charleston can tax the stock of the United States, eo nomine, the states can; and if the states can, it is impossible not to perceive that the fiscal operations of the general government may be completely frustrated by the states. It will be in vain for congress to pass acts authorising the secretary of the treasury to borrow money, if the holders of their stock can be taxed for having done so by the states. Congress may offer ten per cent. for loans, but who will lend, if the states can appropriate the whole to their own use? Whether the states will do so or not may be problematical, but if they can do so, the risk of their doing so must be covered by the terms on which the loans will be made. There is but one substantial security for the proper administration of our governments, the immediate responsibility of the administrators thereof to the people. If, however, the people have or feel no interest in the measures of a government, its administrators are only nominally responsible; they will only be checked where they act in derogation of what is understood or felt to be the interest of their constituents. Remote interests are not seen by the better informed, and they always must pre-

[Weston and others *vs.* The City Council of Charleston.]

Mr Cruger and Mr Legare, for the defendants in error, contended that a writ of error could not be sustained on proceedings in prohibition.

sent grounds for much difference of opinion, even among the best informed. It is not a sufficient guard to the powers of the general government, that the constituents of the administrators of the state governments have a remote interest in the preservation of those powers, or in an unembarrassed exercise of them by the general government. They must not be seen, or may not be understood, and the very case before us, presents a full illustration of the truth. No government, not revolutionary, has ever attempted to tax its own stock, and among others, for two very satisfactory reasons. 1. Because such a tax must necessarily operate injuriously upon all future loans; and 2. Because there is in fact a violation of contract in so doing, and therefore immoral and impolitic. Under the influence of these reasons, the legislature of this state has refused to tax the stock of the United States; but it appears, that the city council of Charleston have thought differently, and have taxed it. There are, however, some very obvious reasons why the council of Charleston should be less disposed to impose such a tax than the legislature. In the first place the city of Charleston being commercial, is more within the influence of the policy of the general government than the legislature: if, therefore, the council of the city can believe it politic and just to tax the stock of the United States, can it be thought improbable that the legislature may do so? If they can do so at all, they may do so to any extent; it is equally within their power to tax twenty per cent. or one hundred per cent. as one-half per cent. What shall govern their discretion, it is impossible to foresee. A state or a few states may concur in a policy at variance with that of the government, nay in hostility to it. This, unfortunately, has been already witnessed. They may, indeed, be indisposed to dissolve the union, and declare war; when they might have no objection to counteract congress, and control its measures by the exercise of a power strictly constitutional. Seven-tenths of the stock of the United States, are owned in the cities of Boston, New York, Philadelphia, Baltimore and Charleston.

The same causes which have concentrated the stock in these cities, will, in all probability, continue to operate, and the greater part of future loans will be effected there. Should, therefore, even so small a portion of the United States as these cities, unite in taxing stock to any considerable amount, the government may be defeated, and will certainly be impeded in its fiscal operations, to the extent of any tax imposed. It may be supposed, that these cities would be checked in such proceedings by their state legislatures. Whether this could be done, must depend upon the constitutions of the states, and the charters of the cities. It may not suit the prevailing policy of a state to interfere in such a case, even if it possess the power. We know, from the charter of the city of Charleston, that the legislature of this state can interfere and repeal the ordinance in question; this, however, has not been done, although they have refused to impose such a tax themselves; and South Carolina is, has always been, and I hope will ever continue to be, as national as any other state in the union. It may be said, that admit all this to be true, it cannot affect the question before the court; who are called upon to decide what the constitution is, and not what it ought to be. The judicial branch of the government most certainly does not possess the power of

[Weston and others *vs.* The City Council of Charleston.]

Should the Supreme Court reverse the judgment below in this case, a mandate will be directed to the inferior state

legislating; much less, then, can they claim the power of making a constitution. But, in construing the constitution, they must look to the objects it professes to attain, and they cannot so as to defeat the very end and aim of its creation, nor can they make it inconsistent with itself, if it be possible to avoid it. The general powers of congress may be sufficiently designated in the constitution, but the extent and ramifications of each power, it was not in the wisdom of man to foresee and precisely describe. How they are to operate and exhibit themselves, must depend upon the future contingent circumstances of the nation; and, as these must be forever varying, constitutional questions or doubts must arise, as long as the constitution shall exist. These are the certain and legitimate consequences of a written constitution. The numerous questions which the statute of frauds has given rise to, simple as was its object, may afford some intimation of the number, which an instrument so complicated and general in its objects as the constitution may be expected to produce. The great difficulty is, not only in ascertaining and defining the powers which result from those which are expressly given to the government; but, (as in this case, and in that of the bank of the United States), in determining the influence of these on the powers of the different states. In the decision of such cases, there must, at least, be the semblance of legislation. I am not conscious of even a desire to extend unnecessarily the powers of the judiciary; the pursuits and habits of near twenty years, by far the better part of my life, have given at least to my feelings a direction decidedly favourable to the legislative branch of the government; when attached in fact, as I was in feeling, to that branch, I could not but discern the importance of the judicial branch of the government, and the necessity of leaving to its decisions all questions like the one before the Court, though they savoured of legislation. I shall certainly not omit to do now what I formerly regarded as incumbent upon the judiciary to perform. I shall now proceed to inquire—1st, Whether the tax in question be an income tax. That it is not, appears very clearly from the facts of the case, as well as from the terms of the ordinance. The stock of the state; the stock of the city; bank stock universally, as well as the profits of agriculture, enjoyed by those who reside in the city, are not taxed; nor does the ordinance affect to regard it as an income tax. It is a tax upon the United States stock, *eo nomine*. As this is not a tax upon income, it is unnecessary to inquire if the city council, or a state, have the power to tax income, and include therein the interest received on United States stock. I shall, therefore, proceed to inquire if the city council, or a state, have the power to tax the United States stock, *eo nomine*. The first question presented by the inquiry is, the meaning of the term United States stock. It is, I apprehend, a credit on the government for so much money, on which they have agreed to pay a certain interest. He who has the credit is the holder, and the certificate is the evidence of the credit, and the terms on which the credit has been given. The power to create this credit is expressly given by the 8th section, 1st article, of the constitution of the United States: "congress shall have power to borrow money on the credit of the United States." The credit of the United States is the essence of the stock; without it the stock is of no value. The credit of the United States is a creation of the general government, which did not exist until they brought it into being; and, in the production of which, the state governments did not par-

[Weston and others *vs.* The City Council of Charleston.]

court. 3 *Dall.* 342. In the event of the state court declining or refusing to carry that mandate into effect, a ques-

ticipate. The state could not tax it before the constitution was formed, for it did not exist; if therefore they can tax it now, it must be by some new power vested in them by that instrument; but there is no such power given: the credit of the United States cannot be taxed by the states. It is contended, that to deny the states a power to tax money loaned to the general government, is to deprive them of a great resource without any adequate object. In the first place, I must observe, that if the states cannot tax the stock of the United States, the general government will be able to borrow on better terms, and in this way the people of the United States will be compensated for any inconvenience that might result from the exemption of the stock from the taxation of the state governments. In the second place, I must repeat, they have no cause to complain, because it is a creation of the general government which the states did not possess before its establishment. But on this subject I cannot but think that a very erroneous opinion prevails. It appears to be thought that for every thousand dollars loaned to the general government, so much taxable property has been withdrawn from the states. But this is certainly not so. Of the one hundred millions of dollars loaned to the general government, during the late war, how much of it remains with the government? Not one cent. Where then is it? Certainly in the states. If a certain number of individuals paid it into the treasury of the United States, the government has returned it to individuals living in the different states; and if liable to taxation at all, can now be taxed by the states. If the general government had been foreign to the state governments, or had they hoarded it up, this objection might have had some force; but as fast as they got it, they returned it, and no means of the state governments were affected, but an increased difficulty of borrowing money, owing to the competition of the general government. One of the great objects of the constitution was to render the general government independent of the state governments, for those pecuniary means which are necessary to effect the great purpose for which it was established: viz. to form a more perfect union, establish justice, ensure domestic tranquillity, provide for the common defence, promote the general welfare, &c. &c. If, however, means so essential in periods of distress and danger, as loans, can be controlled by the states, congress is yet essentially dependent upon the states. There is another objection to this tax. I regard it as a violation of the contract made with the holders of the United States stock. The people of the United States, of whom the citizens of Charleston are a part, have contracted to pay so much per centum on the stock by their agents the general government. To authorise the citizens of Charleston to deduct a part from the interest agreed upon, they must possess the power of altering the contract, without the consent of the holders of the stock, which would be a violation of the obligation of the contract. But the constitution expressly declares that they shall not violate the obligation of contract.

To recapitulate my objections to the tax, they are:

1. Because a tax upon stock of the United States, *eo nomine*, is a tax upon the credit of the United States.

2. Because the credit of the United States was not a subject for taxation by the states, anterior to the adoption of the constitution; the credit of the United States being a result of the establishment of the government of the United States; and the constitution has given no new powers to the state governments.

tion will then arise as to the mode of proceeding to be adopted as a remedy. That a futile exercise of jurisdiction may not on this occasion take place, the difficulty ought to be anticipated; for if it be insurmountable, this tribunal will not, from self-respect, hold cognizance of the principal inquiry involved in the present suit.

Unless the Supreme Court acts in this matter through the intervention of the state tribunal, it must issue a prohibition of itself, addressed to the tax collector individually. Should he disobey, it will then have to proceed against him for a contempt, and inflict a fine; and thus be thrown into a course of practice unprecedented, and extremely inconvenient. That it will not award compulsory process, directed to a recusant state court, may safely be assumed, upon the strength of the reasoning in Martin *vs.* Hunter's lessee, 1 *Wheaton*, 362. If not from a regard to the sovereignty of a state in its last refuge of the judiciary, this resort will not be had at least, because it seems to be negatively precluded by the 25th section of the act of the 24th of September 1789. That section provides for the Supreme Court's "proceeding to a final decision of the cause, and awarding *execution* therein, if it has been once remanded before." Whether under these words, on the refusal of a state court to fulfil its mandate, this Court has jurisdiction in prohibition so as to enable it to execute its own judgment, by inhibiting the officers personally from collecting the tax under consideration, if adjudged unconstitutional, must first be decided. If the power be wanting, nothing but an act of congress can supply the deficiency. The mode and forms of proceeding under the appellate authority of this Court, are dependent upon the

3. Because the objects of taxation by the state governments are not diminished by withholding from them the power of taxing stock of the United States; as the money borrowed by the United States is immediately, by disbursements, returned to the people of the different states.

4. Because it renders the general government dependent upon the discretion of the state governments, for one of its essential means in accomplishing the purposes for which it was established, a result at variance with one of the principal objects of the constitution, which was to render the general government independent of the pecuniary aid of the state governments.

And lastly, because it is a violation of the obligation of contract.

acts of congress for their regulation. 6 *Cra.* 307. Although the 14th section of the judiciary act gives to the courts of the United States "power to issue all writs necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law;" this general grant is limited by the 25th section, in the particular instance of writs of error from final judgments of state courts to "*awarding executions.*" No construction of these words consistent with technical accuracy, will bring a prohibition within their meaning; and original jurisdiction will scarcely be assumed to admit the procedure.

The power of congress to incorporate a bank, or even to invade the territory of a state to establish its branches, cannot be controverted after the decisions in M'Cullough *vs.* Maryland, 4 *Wheat.* 316, and Osborne *vs.* United States Bank, 9 *Wheat.* 738; much less could their right to raise loans for carrying on the operations of government be drawn into question. On the other hand it would be taken as conceded, that the right of the states to impose taxes is sovereign, and concurrent; and that there are no *express* limitations upon this attribute; except those contained in the 18th section, article 1st, of the federal constitution as to duties or imposts on imports, exports, and tonnage.

Through these mutual admissions, the question now to be disposed of, is simply, can a state constitutionally tax the income accruing to its citizens from six and seven per cent. stock of the United States, owned by them individually?

The purpose of plaintiffs in error is to make out by *implication* a restriction upon a sovereign and vital, though a concurrent state right. This is attempted upon substantially three grounds. 1st. That the tax in dispute is a violation of the faith and obligation of a contract. 2d. That the credit of the United States upon which it bears, did not exist until after the constitution was framed. And 3dly. because it *interferes* with the means of the federal government necessary to carry their powers into effect.

As to the first objection, certainly if the United States were to impose a tax, going to diminish the interest it had stipulated to pay the purchasers of this stock, such a mea-

sure would be a violation of faith. But the reason does not hold as to a third person, not a party to the contract; and in this light the state of South Carolina stands; for her faith is pledged as an integral part of the union in this respect only, quoad federal taxation. She has come under no obligation individually, not to draw her resources from these funds, though emanating from the common authority, whenever they pass into the hands of her peculiar citizens; and it may be presumed that the liability of this stock, so situated, to state taxation, was perfectly understood by those who became holders, and entered into their contract with the general government. As well might a tax imposed by a state on the public lands within its limits, when sold out to private persons, be treated as a departure from good faith, and a violation of the contract of sale; for here, as much as where public stock is created and sold, a state is a party to the engagement, that no more than a certain price is to be paid for the property, and that its profits are not to be diminished. It is said, however, that where lands are sold, the United States parts with the freehold with no prospect of resumption, and that it is otherwise with stock. Yet in point of fact, the only difference is between the real and personal property of the government; for in the case of a sale of the former on *credit*, liable to a foreclosure of mortgage, there will be a chance of its reverting to the public domain; and surely it will not be exempted from state taxation until the last cent of the price is paid off.

It is next said that this stock constitutes the *credit* of the union, which, not having existed anterior to the adoption of the constitution, cannot be subjected to state taxes, unless by virtue of some provision in that instrument. This reason if of any avail, will go to exonerate all the territories and other property of the United States acquired subsequently to that epoch; and failing of that result, must be discarded altogether.

The objection most strongly urged however against this ordinance is, that it interferes with a law of the general government, which, being supreme, must predominate, and it is roundly laid down that "should any state directly or in-

directly modify, alter, or abridge any of the acts of sovereignty of the United States, or render any of its measures nugatory, or inoperative, or in any manner impeach the credit, or impair the resources of the union, by taxation or otherwise; the act would be an interference repugnant to the constitution," and that "a state cannot tax any of the constitutional means employed by the government of the United States to execute its constitutional powers;" "nor can it by taxation or otherwise, retard, impede, burthen, or in any manner control the operation of the constitutional laws enacted by congress to carry into effect the powers vested in the national government."

Throughout this discussion the state has been treated of as in an antagonist position towards the federal government, and as seeking purposely to inconmode, and destroy its fiscal operations; while the direct effect of these upon the resources of the state has been allowed no consideration. The ordinance in question is assumed to be a measure passed expressly to countervail and defeat a law of congress. But it is no where demonstrated that a tax on this stock, owned by individuals, will be attended by any such consequence. The utmost that may ensue, will be a prejudice to the *preference* of this stock in market, and perhaps the citizens of the state imposing the tax may find it more profitable to invest their capital otherwise. This creates a question of policy, at the discretion of the state alone, whether it will drive abroad a particular means of speculation; but the reflection is beside the constitutional inquiry now agitated.

The position broadly taken here is, that if the exercise of a concurrent power by a state, interferes with a power of the general government, the former must give way. What is the extent of interference which is to be thus resisted? and how is this interference to be graduated? Here it is always put as mounting to the point of destruction, and as brought into action, ipso intuitu. To presuppose hostility on the part of the state is wholly gratuitous, and greatly to be deprecated. As much may be trusted to the liberality and forbearance of a state, as of the federal government; and

comity, and cordial confidence should characterize all their relations. All the reasoning in this case is against the *abuse* of a conceded state right, and it is founded upon a quia timet, and its materials are extremes. Not even a surmise is thrown out, that this tax has, in point of fact, impeded, much less frustrated, a fiscal operation of government; but it is said, that if the power it involves were pushed further it might have that effect; and that, as it is without any limit or control, save the discretion of a state, no guarantee against its abuse, short of abolition, should be accepted. This is in a strain of hostility that well warrants the interrogatory, why should an unprescriptible sovereign, and indispensable right of a state be postponed, and put in derogation in favour of an implied, auxiliary, and optional means of the general government? Is not the power to use this means also a power to destroy, and alike unlimited?

The general government, by carrying their power to extremes in the creation of extensive loans, *might* furnish facilities of exempt investment, that would entirely absorb from the reach of state taxation all the funds of its citizens, and thus destroy one of its highest prerogatives and very existence. If the possible abuse of the power to tax by a state, is to infringe upon the right, the like objection will assuredly attach to the power of borrowing on the part of the United States. In answer to this a suggestion has been made, that the general government does not hoard up its revenue, but immediately reinstates by expenditure, all that has been substracted from the resources of a state. This is only partially true, and yields but indifferent consolation, and affords occasion for another most forcible impeachment of the prevailing system of internal improvements, and other government expenditures of the public money. By the supposed operation the southern states not only have their capital drawn off from local taxation, but in the existing state of things supply another means of conferring benefits, or rather gratuities, in which they have no participation.

The doctrine that interference with federal power will suffice, by implication, to neutralize, or even annihilate state rights is startling in itself, and most pernicious when

carried out to its legitimate results. The degree of interference being entirely unsettled, and incapable of adjustment, however slight or shadowy it may be, the objection can never be started but to a fatal issue. Indeed it will go to abolish all power in the states, under some circumstances, to levy and collect taxes. In the event of a resort to direct taxation, on the part of congress, whatever is subjected to federal assessment must, ipso facto, be discharged from all other imposition; inasmuch as a tax by a state, on any given article, must necessarily diminish its capacity of bearing other exactions, and, if carried to excess, must frustrate any attempt on the part of the general government to raise a revenue from the same sources. In fact, there are but few powers reserved to the states that, upon the possibility of abuse, may not be brought under the ban of interference with federal measures.

In the case of Bulow et al. *vs.* the City Council of Charleston, 1 *Nott & M'Cord*, 527, it has been decided that United States bank stock, in the hands of individuals, may constitutionally be taxed by a state. And in M'Cullough *vs.* Maryland, it is admitted, that the principle there ascertained "does not extend to a tax paid by the real property of the bank of the United States, in common with the other real property in a particular state, nor to a tax imposed upon the *proprietary interest* which the *citizens* of that state may hold in this institution, in common with other property of the same description throughout the state," and that, "as to the bank stock belonging to its own citizens, it still continues liable to state taxation, as a portion of their individual property in common with all other private property in the state." The stock brought under contribution by the city ordinance now attacked, comes within this exception. When taxed, it had been sold out by government, and was in the hands of individuals, whose proprietary interest in the fund was subjected in common with property of a similar description. The tax here assessed was not in the nature of a penalty on lending to the United States, being neither excessive nor discriminating. If charged on the stock, eo nomine, the name was inserted in

the ordinance merely as a description of one among several sources, from whence the income of the citizens might arise on which it was to bear. The words of the ordinance evince clearly that this species of property was not singled out for proscription, or a sinister purpose, as various others are enumerated; and if an exception is made in favor of stock of the United States bank, and of local institutions, motives of expediency, or the fact that a bonus had been paid in commutation of taxes, probably influenced the departure from, while they recognized the existence of the general rule.

This tax then is not obnoxious to the objections urged against it, and being upon the interest held by individuals in the funded debt of the United States, in common with other property of the same description in South Carolina, it comes within the exception made in the leading case decided by this Court upon the subject, and the ordinance imposing it is constitutional and valid.

Mr Chief Justice MARSHALL delivered the opinion of the Court.

This case was argued on its merits at a preceding term; but a doubt having arisen with the Court respecting its jurisdiction in cases of prohibition, that doubt was suggested to the bar, and a re-argument was requested. It has been re-argued at this term.

The power of this Court to revise the judgments of a state tribunal, depends on the 25th section of the judicial act. That section enacts "that a final judgment or decree in any suit in the highest court of law or equity of a state in which a decision in the suit could be had," "where is drawn in question the validity of a statute or of an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favour of such their validity," "may be re-examined and reversed or affirmed in the Supreme Court of the United States."

In this case the city ordinance of Charleston is the exercise of an "authority under the state of South Carolina,"

"the validity of which has been drawn in question on the ground of its being repugnant to the constitution," and "the decision is in favour of its validity." The question therefore which was decided by the constitutional court, is the very question on which the revising power of this tribunal is to be exercised, and the only inquiry is, whether it has been decided in a case described in the section which authorises the writ of error that has been awarded. Is a writ of prohibition a suit?

The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice, which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought, is a suit. The question between the parties, is precisely the same as it would have been in a writ of replevin, or in an action of trespass. The constitutionality of the ordinance is contested; the party aggrieved by it applies to a court; and at his suggestion, a writ of prohibition, the appropriate remedy, is issued. The opposite party appeals; and, in the highest court, the judgment is reversed and judgment given for the defendant. This judgment was, we think, rendered in a suit.

We think also that it was a final judgment in the sense in which that term is used in the 25th section of the judicial act. If it were applicable to those judgments and decrees only in which the right was finally decided, and could never again be litigated between the parties, the provisions of the section would be confined within much narrower limits than the words import, or than congress could have intended. Judgments in actions of ejectment, and decrees in chancery dismissing a bill without prejudice, however deeply they might affect rights protected by the constitution, laws, or treaties of the United States, would not be subject to the revision of this Court. A prohibition might issue, restraining a collector from collecting duties, and this Court would not revise and correct the judgment. The word "final" must be understood in the section under consideration, as apply-

ing to all judgments and decrees which determine the particular cause.

We think then that the writ of error has brought the cause properly before this Court.

This brings us to the main question. Is the stock issued for loans made to the government of the United States liable to be taxed by states and corporations?

Congress has power "to borrow money on the credit of the United States." The stock it issues is the evidence of a debt created by the exercise of this power. The tax in question is a tax upon the contract subsisting between the government and the individual. It bears directly upon that contract, while subsisting and in full force. The power operates upon the contract the instant it is framed, and must imply a right to affect that contract.

If the states and corporations throughout the union, possess the power to tax a contract for the loan of money, what shall arrest this principle in its application to every other contract? What measure can government adopt which will not be exposed to its influence?

But it is unnecessary to pursue this principle through its diversified application to all the contracts, and to the various operations of government. No one can be selected which is of more vital interest to the community than this of borrowing money on the credit of the United States. No power has been conferred by the American people on their government, the free and unburthened exercise of which more deeply affects every member of our republic. In war, when the honour, the safety, the independence of the nation are to be defended, when all its resources are to be strained to the utmost, credit must be brought in aid of taxation, and the abundant revenue of peace and prosperity must be anticipated to supply the exigences, the urgent demands of the moment. The people, for objects the most important which can occur in the progress of nations, have empowered their government to make these anticipations, "to borrow money on the credit of the United States." Can any thing be more dangerous, or more injurious, than the admission of a principle which authorizes every state and every corporation in

the union which possesses the right of taxation, to burthen the exercise of this power at their discretion?

If the right to impose the tax exists, it is a right which in its nature acknowledges no limits. It may be carried to any extent within the jurisdiction of the state or corporation which imposes it, which the will of each state and corporation may prescribe. A power which is given by the whole American people for their common good, which is to be exercised at the most critical periods for the most important purposes, on the free exercise of which the interests certainly, perhaps the liberty of the whole may depend; may be burthened, impeded, if not arrested, by any of the organized parts of the confederacy.

In a society formed like ours, with one supreme government for national purposes, and numerous state governments for other purposes; in many respects independent, and in the uncontrolled exercise of many important powers, occasional interferences ought not to surprise us. The power of taxation is one of the most essential to a state, and one of the most extensive in its operation. The attempt to maintain a rule which shall limit its exercise, is undoubtedly among the most delicate and difficult duties which can devolve on those whose province it is to expound the supreme law of the land in its application to the cases of individuals. This duty has more than once devolved on this Court. In the performance of it we have considered it as a necessary consequence from the supremacy of the government of the whole, that its action in the exercise of its legitimate powers, should be free and unembarrassed by any conflicting powers in the possession of its parts; that the powers of a state cannot rightfully be so exercised as to impede and obstruct the free course of those measures which the government of the states united may rightfully adopt.

This subject was brought before the Court in the case of M'Cullough *vs.* The state of Maryland(*a*), when it was thoroughly argued and deliberately considered. The question decided in that case bears a near resemblance to that

(*a*) 4 *Wheaton*, 316.

which is involved in this. It was discussed at the bar in all its relations, and examined by the Court with its utmost attention. We will not repeat the reasoning which conducted us to the conclusion thus formed; but that conclusion was that "all subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are upon the soundest principles exempt from taxation." "The sovereignty of a state extends to every thing which exists by its own authority, or is introduced by its permission;" but not "to those means which are employed by congress to carry into execution powers conferred on that body by the people of the United States." "The attempt to use" the power of taxation "on the means employed by the government of the union in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give."

The Court said in that case, that "the states have no power by taxation, or otherwise, to retard, impede, burthen, or in any manner control the operation of the constitutional laws enacted by congress, to carry into execution the powers vested in the general government."

We retain the opinions which were then expressed. A contract made by the government in the exercise of its power, to borrow money on the credit of the United States, is undoubtedly independent of the will of any state in which the individual who lends may reside, and is undoubtedly an operation essential to the important objects for which the government was created. It ought, therefore, on the principles settled in the case of M'Cullough *vs.* The State of Maryland, to be exempt from state taxation, and consequently from being taxed by corporations deriving their power from states.

It is admitted that the power of the government to borrow money can not be directly opposed, and that any law directly obstructing its operation would be void; but, a distinction is taken between direct opposition and those measures which may consequentially affect it; that is, that a law prohibiting loans to the United States would be void, but a tax on them to any amount is allowable.

It is, we think, impossible not to perceive the intimate

connexion which exists between these two modes of acting on the subject.

It is not the want of original power in an independent sovereign state, to prohibit loans to a foreign government, which restrains the legislature from direct opposition to those made by the United States. The restraint is imposed by our constitution. The American people have conferred the power of borrowing money on their government, and by making that government supreme, have shielded its action, in the exercise of this power, from the action of the local governments. The grant of the power is incompatible with a restraining or controlling power, and the declaration of supremacy is a declaration that no such restraining or controlling power shall be exercised.

The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extant, however inconsiderable, it is a burthen on the operations of government. It may be carried to an extent which shall arrest them entirely.

It is admitted by the counsel for the defendants, that the power to tax stock must affect the terms on which loans will be made; but this objection, it is said, has no more weight when urged against the application of an acknowledged power to government stock, than if urged against its application to lands sold by the United States.

The distinction is, we think, apparent. When lands are sold, no connexion remains between the purchaser and the government. The lands purchased become a part of the mass of property in the country with no implied exemption from common burthens. All lands are derived from the general or particular government, and all lands are subject to taxation. Lands sold are in the condition of money borrowed and re-paid. Its liability to taxation in any form it may then assume is not questioned. The connexion between the borrower and the lender is dissolved. It is no burthen on loans, it is no impediment to the power of borrowing, that the money, when re-paid, loses its exemption from taxation.

But a tax upon debts due from the government, stands, we think, on very different principles from a tax on lands which the government has sold.

"The Federalist" has been quoted in the argument, and an eloquent and well merited eulogy has been bestowed on the great statesman who is supposed to be the author of the number from which the quotation was made. This high authority was also relied upon in the case of M'Cullough *vs.* The state of Maryland, and was considered by the Court. Without repeating what was then said, we refer to it as exhibiting our view of the sentiments expressed on this subject by the authors of that work.

It has been supposed that a tax on stock comes within the exceptions stated in the case of M'Cullough *vs.* The state of Maryland. We do not think so. The bank of the United States is an instrument essential to the fiscal operations of the government, and the power which might be exercised to its destruction was denied. But property acquired by that corporation in a state was supposed to be placed in the same condition with property acquired by an individual.

The tax on government stock is thought by this Court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the constitution.

We are, therefore, of opinion that the judgment of the constitutional court of the state of South Carolina, reversing the order made by the court of common pleas, awarding a prohibition to the city council of Charleston, to restrain them from levying a tax imposed on six and seven per cent. stock of the United States, under an ordinance to raise supplies to the use of the city of Charleston for the year 1823, is erroneous in this; that the said constitutional court adjudged that the said ordinance was not repugnant to the constitution of the United States; whereas, this Court is of opinion that such repugnancy does exist. We are, therefore, of opinion that the said judgment ought to be reversed and annulled, and the cause remanded to the constitutional court for the state of South Carolina, that farther proceedings may be had therein according to law.

[Weston and others *vs.* The City Council of Charleston.]

Mr Justice JOHNSON, dissentiente.—Entertaining different views on the questions in this cause from the majority of the Court, and wishing generally that my reasons for my opinions on constitutional questions should appear, where they cannot be misunderstood or misrepresented, I will briefly state the ground upon which I dissent from the decision now rendered.

On the first point I am of opinion, that the cause is not one within either the letter or the policy of the 25th section of the judiciary act.

That the suggestion and motion to obtain a prohibition is a suit in its general sense, cannot be questioned; but that is not enough, to give this Court jurisdiction; it must be a suit within the meaning and policy of the law which gives this writ of error. The words of the 25th section are, "a final judgment or decree on any suit;" from which I think it unquestionable that it must be a suit capable of terminating in a final judgment or decree. Now a prohibition, especially where it is refused, as in this case, is not final, and concludes no body. If the party against which it was prayed goes on to carry into effect an unconstitutional law, he to whom it was refused, is at liberty to bring his action of trespass, and the refusal of the prohibition would be no bar to his recovery.

Indeed, in cases of prohibition, there is no consideratum est, no judgment entered, except, as well as I can recollect, in two cases: in that where it is first granted and then dissolved, and a writ of consultation awarded authorizing the defendant to proceed; and in the case where the promovent is ruled to declare, and the cause goes on to judgment in the usual form. When it is refused there is never a judgment entered, nor where it is granted in ordinary cases; and hence it is laid down generally that no writ of error lies in prohibition. There is no ground that I can perceive, to suppose that congress intended any innovation in the ordinary rules of law as to suing out writs of error. On the contrary, in authorizing a writ of error to a final judgment in so many words, the legal conclusion is that they need not to adhere to the rule that a writ of error can only issue to recover a judgment as technically understood.

Again, *the suit* to which this section has relation must be a suit in which this Court possesses or can exercise the power to enter judgment and award execution; because the latter part of the 25th section enacts, "that the Supreme Court may at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, *and award execution.* Now if the term execution here be taken in its ordinary technical meaning, this is not a case in which it can issue; the sole object of this prohibition being to stay the proceedings of the city council and city sheriff under the law complained of; and if the issuing of a prohibition be considered as coming within the meaning of execution as here used, then this Court has no power to issue a prohibition to a state, court or state officer. Congress has not pretended to vest in it such authority. And I am well satisfied that this power has been withheld from the courts of the United States ex industriâ. For every provision in the constitution and the uniform policy of the government, have been to prevent the immediate action of the one government upon the constituted authorities of the other, a collision which it was a leading object in the constitution to avoid, because its effects were unavoidably and fully anticipated.

If it be asked, or has been argued, why may not this Court proceed as far as it can proceed, and reverse the judgment of the state court, or enter a judgment for a prohibition, though it cannot issue it; I answer, simply because the case wants those distinctive features which are necessary to make out a case for the interference of this Court under the 25th section. And I cannot imagine that the legislature would place this Court in the unenviable dilemma of thus assuming ungranted powers, or of exercising jurisdiction in a case over which it could assume no coercive power.

Hence I conclude, that neither the letter nor the policy of the law, sanctions us in exercising this jurisdiction. Nor is there the least necessity for it, since every beneficial end may be answered, when individuals are brought into controversy, by the ordinary proceedings under an unconstitu-

tional law; and until this conflict of interest arise from the actual execution of process, the law remains a mere "brutum fulmen."

My views of the question of jurisdiction would exempt me from the necessity of giving an opinion on the constitutionality of the case under consideration. But I have no objection to expressing my opinion upon this question.

If I could bring myself to consider this question in the form in which it is considered by the majority of the Court, I should certainly concur in the opinion, that the tax was unconstitutional. For, the exercise of a power, which, under the mask of imposing a tax, may defeat or impede the operation of the government of the United States in borrowing money, could not be tolerated. But I am strongly impressed with the opinion, that the record does not authorise this state of the question. It is true the act of the city council of Charleston, which imposes this tax, is most clumsily worded. But I think it clear that, taken together, the object is to impose an income tax. This, I think, is necessarily inferred from the fact, that the tax is not imposed upon money at interest generally, but only on so much as the individual has at interest above what he owes or pays an interest upon. The operation of this is to charge no more than his clear income from money at interest. It is objected, that they make discriminations, and exempt from taxation state stock, city stock, and stock of their own chartered banks. But then they exempt also, stock of the United States bank; and there can be no better proof demanded to show, that the law is conceived in the spirit of fairness, with a view to revenue, and no masked attack upon the powers of the general government. Had they, in fact, taxed any one of these excepted objects, we should have had the law brought up here as a violation of the obligation of contracts; since the statute books of the state will show, that all their banks, with the exception of the state bank, have paid a bonus to the state. And it would have been impossible to tax the state bank, because the stock is altogether owned by the state, and the laws of the council are subject to be repealed by the state.

As to the specification of six and seven per cent. stock of the United States as objects of taxation, this also admits of an explanation, showing that the council acted in the spirit of fairness and candour, although certainly not happy in expressing the legislative mind. This specification became necessary, from their imposing the tax by means of a per centage of twenty-five cents upon the capital at interest, instead of a per centage on the interest received. Hence to have brought the four and three per cent. stock of the United States under the tax, would have been unequal and unjust; and there can be little doubt that to avoid this inequality was their object.

I consider the case therefore as one of a tax upon income arising from the interest of money; a very unwise and suicidal tax unquestionably, and not very judiciously arranged and expressed; but still characterized by no unfairness, and no masked attack upon the powers of the general government. And if so, with what correctness can it be characterized as unconstitutional?

Why should not the stock of the United States, when it becomes mixed up with the capital of its citizens, become subject to taxation in common with other capital? Or why should one who enjoys all the advantages of a society purchased at a heavy expense, and lives in affluence upon an income derived exclusively from interest on government stock, be exempted from taxation?

No one imagines that it is to be singled out and marked as an object of persecution, and that a law professing to tax, will be permitted to destroy: this subject was sufficiently explained in M'Cullock's case. But why should the states be held to confer a bonus or bounty on the loans made by the general government? The question is not whether their stock is to be exposed to peculiar burthens; but whether it shall enjoy privileges and exemptions, directly interfering with the power of the states to tax or to borrow.

I can see no reason for the exemption, and certainly cannot acquiesce in it

Mr Justice THOMPSON, dissentiente.—This case comes before us under the 25th section of the judiciary act of 1789,

on a writ of error to the constitutional court of the state of South Carolina, the highest court of appeals in that state. The question in the state court arose upon proceedings commenced in an inferior court, and the issuing of a prohibition to restrain the city council of Charleston, and all other persons acting under their authority, from levying and collecting a tax on stock of the United States, held by the appellants; on the ground, that such tax was a violation of the constitution of the United States. The prohibition having been granted by the inferior court, the order and judgment of that court were reversed in the constitutional court, thereby upholding the constitutionality of the tax.

A preliminary question has been raised, whether this Court has jurisdiction of the case, under the 25th section of the judiciary act. I think we have not. It is not a suit within the meaning of that section; and if it was, the writ of error is brought to reverse a judgment, *refusing to grant* the prohibition. And if that judgment or order should be reversed here, this Court has no power to enforce its judgment, or give the party any relief or protection against the imposition of the tax. But I shall not enter into an examination of this question: it is one of minor importance; as I understand this Court does not claim the power of enforcing its judgment in any manner whatever, and the ordinance will remain in full force, and the payment of the tax be enforced unless the city council shall voluntarily repeal it, and revoke the order to collect the tax. The judgment of this Court is, therefore, no more than an opinion expressed upon an abstract question, and in its nature and effect only monitory.

In considering this case on the merits, it is to be borne in mind, that this ordinance of the city council is subject to be repealed by the legislature of South Carolina, and not having been done, we must consider it as having tacitly received the sanction of the legislature, and comes before us, therefore, with all the force and authority of a state law, and involves one of those delicate and difficult inquiries of conflicting powers between the general and state governments.

It is necessary, in the first place, that we should understand the true character of this tax. Much importance seemed to

be attached to this, both in the court below and on the argument here. In the opinion of the minority of the state court, which has been submitted to us by the appellants' council as a part of his argument, it is said, "this ordinance does not affect to regard the tax as an income tax. It is a tax upon the United States stock *eo nomine*. As it is not a tax on income, it is unnecessary to inquire, if the city council or a state have the power to tax income, and include therein the interest received on United States stock. The inquiry is, whether there is any such power to tax United States stock *eo nomine*." This distinction being so emphatically relied upon by the minority of the Court, it is a fair inference, that if it had been considered a tax on income, it would not be objectionable on constitutional grounds.

What are we to understand by its being a tax on United States stock *eo nomine*? Certainly, nothing more than that it is enumerated as one description, in a long list of specified property subject to taxation.

We have not the ordinance at large before us, but the clause upon which the question arises, is stated as follows: All personal estate, consisting of bonds, notes, insurance stock, &c. &c. six and seven per cent. stock of the United States, or other obligations, upon which interest has been, or will be received during the year, over and above the interest which has been paid, twenty-five cents on every hundred dollars. There is excepted out of this enumeration, stock of the state, stock of the city, and bank stock. But this exception cannot certainly affect the present question. No part of the constitution of the United States, prohibits the states from exempting from taxation certain species of property, according to their own views of policy or expediency.

What then is the ordinance in substance? It is a tax upon the *net* income of interest, upon money secured by bonds, notes, insurance stock, six and seven per cent. stock of the United States, or other obligations, upon which interest has been received, &c. It is the net interest received upon which the tax is laid. For the ordinance declares the tax shall be on the interest received over and above that

which has been paid. For example: he who receives $1000 interest, and pays out $500 interest, is taxed only upon the balance. It is, therefore, a general tax upon an income from money at interest, and this too only included as one item in the enumeration of taxable property. It is not an objection that can be made here, if any where, that the tax is not upon the whole income. It is a tax, general in its application to income, from interest derived from investments of every description (with the exception mentioned) and money on loan. It cannot be considered as an exorbitant tax, or in any manner partaking of the character of a penalty. It being only a tax of a quarter of one per cent.

If the objection to this tax is to be sustained, it must be on the broad ground that stock of the United States is not taxable in any shape or manner whatever; that it is not to be included in the estimate of property subject to taxation: and that I understand is the extent to which a majority of this Court mean to carry the exemption. As I am unable to come to this conclusion, and it being a constitutional question of vital importance; I am constrained to dissent from the opinion of the Court, and, contrary to my usual practice in ordinary cases, briefly to assign my reasons.

I shall, for the reason already mentioned, consider this ordinance as standing upon the same grounds precisely as if it had been a law of the state of South Carolina.

It is not pretended that there is any express prohibition in the constitution of the United States, which has been violated by this law.

The only express limitation to the power of the individual states, to lay and collect taxes, is to be found in the 10th section of the first article of the constitution. "No state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, &c. No state shall, without the consent of congress, lay any duty of tonnage." The tax in question can certainly not fall within either of these prohibitions.

The objection to the tax is rested chiefly, if not entirely, upon that part of the 8th section of the first article, which

gives to congress the power "to borrow money on the credit of the United States." And it is said that to permit the states to tax the stock, might, by possibility, sometimes embarrass the United States in procuring loans. In the examination of the powers of the general government under the constitution, "The Federalist" is often referred to as a work of high authority on questions of this kind; and the author has seldom been charged with surrendering any powers that can be brought fairly within the letter or spirit of the constitution. In No. 32 of that work, the writer, in discussing the subject of taxation, and the conflicts that might arise between the general and state governments, says, "Although I am of opinion that there would be no real danger of the consequences to the state governments, which seem to be apprehended from a power in the union to control them in the levies of money, yet I am willing to allow, in its full extent, the justness of the reasoning, which requires that the individual states should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants. And making this concession, I affirm, that (with the sole exception of duties on imports and exports) they would, under the plan of the convention, retain that authority, in the most absolute and unqualified sense; and that an attempt on the part of the national government to abridge them in the exercise of it, would be a violent assumption of power, unwarranted by any article or clause of its constitution. That a negation of the authority of the states to impose taxes on imports and exports, is an affirmance of their authority to impose them on all other articles. That it is not a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy, that can by implication alienate and extinguish a pre-existing right of sovereignty."

The power of the general government to borrow money on the credit of the United States, is not only an express power granted to congress, but one that it must have been foreseen would be brought into practical operation, and that stock would of course be created; and yet it never entered into the discriminating mind of the writer referred

to, that merely investing property, subject to taxation, in stock of the United States, would withdraw the property from taxation. It is said, the credit of the United States is a creation of the general government, which did not exist until they brought it into being, and in the production of which the state governments did not participate; that the states could not tax it before the constitution was formed, for it did not exist. This view of the subject is calculated to make an erroneous impression. It is true it did not exist in the shape of stock, but the property existed in some other form. No one procures stock without exchanging for it an equivalent in money or some other property; all which was, doubtless, subject to the payment of taxes. Exemption from taxation may hold out an inducement to invest property in stock of the United States, and might, possibly, enable the government to procure loans with more facility, and perhaps on better terms. But this possible, or even certain benefit to the United States, cannot extinguish pre-existing state rights. To consider this a tax upon the means employed by the general government for carrying on its operations, is, certainly, very great refinement. It is not a tax that operates directly upon any power or credit of the United States. The utmost extent to which the most watchful jealousy can lead is, that it may, by possibility, prevent the government from borrowing money on quite so good terms. And even this inconvenience is extremely questionable; for the stock only pays the same tax that the money with which it was purchased did. And whether the property exists in one form or the other, would seem to be matter of very little importance to the owner. But great injustice is done to others, by exempting men who are living upon the interest of their money, invested in stock of the United States, from the payment of taxes; thereby establishing a privileged class of public creditors, who, though living under the protection of the government, are exempted from bearing any of its burthens. A construction of the constitution, drawing after it such consequences, ought to be very palpable before it is adopted.

But it seems to me, that the right of the states to tax pro-

perty of this description is admitted by the Court, in the case of M'Cullough *vs.* The state of Maryland, 4 *Wheat.* 436. The Court there considered the tax imposed *directly* upon the operations of the bank, which was employed by the government as one of the means of carrying into execution its constitutional powers; and in summing up the result, it is said, the states have no power by taxation, or otherwise, to retard, impede, burthen, or in any manner control the operations of the constitutional laws of congress, to carry into execution the powers vested in the general government; and yet the Court say this opinion does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in the bank, in common with other property of the same description throughout the state.

In the case now before us, the tax is not direct upon any means used by the government to carry on its operation. It is only a tax upon property acquired through one of the means employed by the government to carry on its operations, viz. the power of borrowing money upon the credit of the United States; and it is not perceived how any just distinction can be made in this respect, between bank stock, and stock of the United States; both are acquired through the medium of means employed by the government in carrying on its operations; and both are held as private property; and it is immaterial to the present question in what manner it was acquired.

The broad proposition (laid down in the case of M'Cullough *vs.* The state of Maryland) that the states cannot tax any instrument or means used by the general government in the execution of its powers, must be understood as referring to a direct tax upon such means or instrument; and that such was the understanding of the Court, is to be inferred from the exemption of bank stock from the operation of the rule; and the parallel cases put to illustrate the application of the doctrine lead to the same conclusion. Thus it is said the states cannot tax the mint; but this does not imply that they may not tax the money coined at the mint, when held and owned by individuals. Again, it is said the states cannot

tax a patent right; but if the patentee, from the sale or use of his patent has acquired property, or is receiving an income, it could not be intended to say that such property or income cannot be taken into the estimate of his taxable property.

The unqualified proposition that a state cannot directly or indirectly tax any instrument or means employed by the general government in the execution of its powers, cannot be literally sustained. Congress has power to raise armies, such armies are made up of officers and soldiers, and are instruments employed by the government in executing its powers; and although the army, as such cannot be taxed, yet it will not be claimed, that all such officers and soldiers are exempt from state taxation. Upon the whole, considering that the tax in question is a general tax upon the interest of money on loan, I cannot think it any violation of the constitution of the United States, to include therein interest accruing from stock of the United States.

I am accordingly of opinion, that there is no error in the opinion of the state court.

This cause came on to be heard on the transcript of the record from the constitutional court of the state of South Carolina, and was argued by counsel; on consideration whereof, this Court is of opinion, that there is error in the judgment of the said court in this, that the said court decided that an ordinance passed by the city council of Charleston for the year 1823, entitled, an ordinance to raise supplies for the use of the city of Charleston for the year 1823, is, so far as the same imposes a tax on the six and seven per cent. stock of the United States, consistent with the constitution of the United States. Whereas, it is the opinion of this Court, that so much of the said ordinance as imposes the said tax, is repugnant to the constitution of the United States, and void. Whereupon it is considered, ordered and adjudged by this Court, that the said judgment be, and the same is hereby reversed and annulled, and that the said cause be, and the same is hereby remanded to the said constitutional court for the state of South Carolina, that such further proceedings may be had therein as may consist with law and justice.